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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-1141

WALTER E. HELLER & COMPANY,

Petitioner,

vs.

FIRST VIRGINIA BANKSHARES CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Brief History of This Action

On March 22, 1973, respondent, First Virginia Bankshares Corporation ("First Virginia") acquired all of the stock of Benson Investment Corporation ("Benson Co."), an Alabama consumer finance company with a number of offices in the Southeastern states, through a stock-for-stock exchange (the "merger"). On October 23, 1973, First Virginia commenced this action in the United States District Court for the Northern District of Alabama, claiming fraud in that stock transaction under federal securities laws and Alabama statutes pertaining to fraud. Petitioner, Walter E. Heller & Company ("Heller"), was added as a defendant following ten months of discovery.

Trial by jury, as demanded by Heller, commenced on July 7, 1975, and ended in a jury verdict in First Virginia's favor against Heller and two of the individual defendants, George J.

Benson and Alan Benson (sometimes jointly referred to as the "Bensons"). A general verdict was returned as none of the parties had requested special interrogatories or special verdicts. Heller filed post trial motions attacking the judgment entered with respect to the jury verdict, and those motions after consideration and argument were overruled by the district court on August 29, 1975.

In September, 1975, Heller and the Bensons appealed the adverse judgment against them to the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit"). Following the submission of several briefs by both Heller and First Virginia, and oral argument, the Fifth Circuit unanimously affirmed the judgment against Heller (and the Bensons) in an opinion entered on September 29, 1977. Thereafter, Heller filed a motion for rehearing (adopted by the Bensons), and a request for rehearing *en banc*, which was denied on November 14, 1977.

Heller obtained a stay of the issue of the mandate pending application for certiorari, and filed its petition for certiorari on February 13, 1978, the last permissible date. The Bensons did not join in Heller's petition.

Additional Statutes Involved

Pertinent sections of *Ala. Code 1940* (Recomp. 1958) are:

> §108. *Misrepresentations.* — Misrepresentations of a material fact, made wilfully to deceive, or recklessly without knowledge, and acted on by the opposite party, or if made by mistake and innocently, and acted on by the opposite party, constitute legal fraud.
>
> §109. *Suppression of the truth.* — Suppression of a material fact, which the party is under an obligation to communicate, constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties, or from the particular circumstances of the case.
>
> §110. *Deceit.* — Wilful misrepresentation of a material fact, made to induce another to act, and upon which he does act to his injury, will give a right of action. Mere concealment of such a fact, unless done in such a manner as to deceive and mislead, will not support an action. In all cases of deceit, knowledge of a falsehood constitutes an essential element. A fraudulent or reckless representation of facts as true, which the party may not know to be false, if intended to deceive, is equivalent to a knowledge of the falsehood.

Corrected Statement of The Case

The petition for certiorari is substantially misleading in the failure to disclose the very significant adverse information Heller had accumulated with reference to the Benson Co. operations before May 24, 1972, when the head of Heller's rediscount division, Mr. Robert Abrahams ("Abrahams"), made certain meaningful representations to First Virginia's agent, upon which representations First Virginia relied in entering the merger. Heller further neglected to reveal that the district court's charge to the jury premised liability against Heller solely upon misrepresentations by Abrahams in a telephone call on May 24, 1972. Heller's failure objectively to present the facts prompts this response.

At the time of the merger, on March 22, 1973, Benson Co. was largely owned and entirely operated by the Bensons, George Benson being the largest stockholder and chairman of the board of directors, Alan Benson being president and chief executive officer. The Bensons received substantial blocks of First Virginia stock in conjunction with the merger.

From 1971 up to and through the merger on March 22, 1973, there were certain basic concealment practices conducted at Benson Co. in connection with the ledger cards maintained with reference to the actual (or apparent) loans. Each ledger card constituted the only record of payments made with respect to a particular loan. These concealment practices were as follows: (i) ledger cards were posted to reflect a payment when in fact no payment had been received, (ii) payments were posted to ledger cards as "A&H" payments (accident and health insurance) when in fact the debtor had not made any insurance

claim and no payment was made by any insurance company, (iii) ledger cards of delinquent accounts were retyped and updated, giving the loan status a current appearance, (iv) ledger cards were made up with reference to fictitious loans where there was no genuine borrower, and (v) payments received by Benson Co. from bankruptcy court were "spread around" to a number of delinquent accounts rather than being fully applied to the account of a particular paying debtor. (51, X:3081-3120)[1] All of these practices were devised to conceal the delinquent, inactive or loss status of the loans represented by these ledger cards. The pertinent balance sheets submitted by Benson Co. to First Virginia, warranted by Benson Co. to be correct, all reflected the loan accounts as assets and included the accounts tainted by these practices. (51, X:3126-3132) Had those loans, which should have been written off as losses in accordance with generally accepted accounting principles, not been included in the balance sheet, Benson Co. would have been insolvent by the approximate amount of $650,000 at the time of the merger. (51, VIII:2487)

The value of the First Virginia stock exchanged for the Benson Co. stock in the merger was $1,425,000. (51, VI:1351-1352)

Pertinent Relationships of the Parties existing Prior to May, 1972

Heller is a large, established and substantial financial institution and recognized as such. Heller and Benson Co. were, and had been for many years, parties to a rediscount financing agreement whereby Heller advanced funds secured by an assignment of all its accounts receivable to Heller. (51, IV:2*) (51, VIII:2234-2235) First Virginia was cognizant of Heller's "fine reputation," considered Heller an expert in the rediscount business, and recognized that Heller was making extensive loans to Benson Co. and holding a substantial part of Benson Co.'s assets as collateral for those loans. (51, VII:1526) Heller's reputation for expertise was most meaningful to First Virginia in that Benson Co.'s receivables assigned to and accepted by Heller as collateral were the very assets which First Virginia would obtain through the merger and would also be security for loans made to Benson Co. (51, VI:1514)

[1]Record references are as delineated by Heller (Pet. 5), only references include a citation to the particular volume number in Roman numerals preceding the page number.

First Virginia employed M. L. Michelman & Company ("Michelman") to contact Heller, in order to ascertain the quality of Heller's relationship with Benson Co. and Heller's knowledge of the honesty and integrity of the Bensons. Michelman had twenty years of experience with small loan companies, specializing in the "business of merging small loan companies." (51, V:1028) Michelman had the "highest national reputation for conducting the business of arranging mergers for small loan companies." (51, V:1029) Michelman had met and was personally acquainted with Abrahams, knew him by reputation, and (at least by May 24, 1972) the two were on a first-name basis. (51, V:1029-1030) Heller (Abrahams) knew that Michelman was in the business of arranging mergers and acquisitions of small loan companies. (51, VIII:2285-2286)

Heller was the largest and only secured creditor of Benson Co. The rediscount agreement which was the predicate of Heller's credit advances to Benson Co. provided for and contemplated Heller's periodic and intensive review of Benson Co.'s records. Heller did, in fact, make periodic and detailed examinations of Benson Co.

At all times pertinent to this action, Abrahams was vice president in charge of Heller's rediscount division and served as "chief executive officer" of that division which was responsible for the Benson Co. account, and the only Heller department doing business with Benson Co. (51, VIII:2230-2238) Abrahams had a personal acquaintance and relationship with the Bensons extending over a twelve-year period and was counsel and confidant to Benson Co. (51, IV:1*) (51, VIII:2235-2237, 2321) When the concealment at Benson Co. involving the A&H payments surfaced in the Fall of 1971, the situation was han-

dled directly by Abrahams with the Bensons, Abrahams summoning the Bensons to Chicago.

What Heller Knew on May 24, 1972 When the Representations Were Made

It is without contradiction that Heller knew: (i) Michelman was in the business of arranging the sale of small loan companies, (ii) the "Bensons were trying to get somebody to buy them" at least as early as March, 1972, and (iii) bank holding companies were desirous of obtaining small loan companies.[2] (51, VIII:2325-2326)

On May 24, 1972, when Abrahams reported that Heller's experience with Benson Co. had been satisfactory for many years and that Heller would lend Benson Co. more money if the Bensons were not thinking of selling, Heller was in possession of most specific and material information. Acquisition of this information was a concomitant of the business relationship between Heller and Benson Co.

In October of 1971 Heller knew that Benson Co. was concealing the delinquent and inactive status of some of its accounts through the A&H payment scheme, thereby admittedly having actual knowledge of one of the major concealment practices. (51, VIII:2250-2253, 2307-2309) Abrahams was well aware that this practice resulted in giving Benson Co. the appearance of having more assets than it really had. (51, VIII:2298)

Heller makes the incredible statement that "A periodic examination of Benson Co. by Heller in January of 1972 disclosed no irregularities in Benson Co.'s operations." (Pet. 6) With prior knowledge of the A&H concealment practice, Heller determined through its examination in January, 1972 that some $624,000 worth of accounts were ineligible receivables. (Pl. Ex. WH-4A) (51, VIII:2283) Through its January, 1972 examina-

[2]A legitimate inference is that prior to May 24, 1972, Alan Benson had informed Abrahams that First Virginia was seeking to purchase Benson Co., as Abrahams testified that Alan Benson so informed him perhaps one, two or three months before July 14, 1972. (51, VIII:2312-2314)

tion of Benson Co. as of year end 1971, Heller knew that Benson Co. was reporting approximately $350,000 worth of loans as assets to which Heller ascribed no value, resulting in an overstatement of earnings by Benson Co. (See page 5, Pl. Ex. WH-4A) Based upon what it considered to be Benson Co.'s overstatement of assets, Heller knew by January of 1972 that it had an outstanding loan of 3.6 million dollars to a company reporting an operating profit for the six-month period ending December 31, 1971 of some $145,000 (Pl. Ex. WH-27) which, in fact, had a loss for that period of some $187,000. (51, VIII: 2245) Heller knew that at year end 1971 Benson Co. had no earnings with which to repay the Heller loan, and Heller knew that Benson Co. was intentionally disguising deterioration of receivables which constituted Heller's collateral. Clearly, Heller's experience with Benson Co. was not satisfactory. Heller had determined that its loan was in grave jeopardy, and knew that the Benson Co. financial reports were false.

Heller terminated its line of credit to Benson Co. coinciding with these findings in January, 1972. (51, VIII:2282-2283) Abrahams stated that in early 1972 he and Alan Benson "mutually agreed" that "it would be better if he had financing elsewhere." (51, VIII:2259) When Abrahams told Michelman that "more money could be made available by Heller," Heller had made no advances to Benson Co. since the January, 1972 examination, and there was an agreement that more money would *not* be made available. Heller never advanced Benson Co. further funds except to enable Benson Co. to pay past due interest.

When Abrahams stated that "Benson Co. had always met its obligations promptly," Benson Co. was in default under the rediscount agreement with respect to payment of April interest. Heller had received a check in the amount of $35,600, dated May 22, 1972, submitted by Benson Co. for accrued interest. However, Heller did not negotiate this check until it wired $35,000 to Benson Co. on May 26, 1972. The evidence confirms that but for these funds from Heller, Benson Co. did not have sufficient cash to cover this check.

The source of the representations made to Michelman was the Heller officer who was most knowledgeable and conversant with Heller's relationship with Benson Co. and who would have sustained the highest degree of personal responsibility in the event Heller's loan to Benson Co. proved to be a disaster.

I.

The Petition for a Writ is an Invitation to this Court to Conduct a Third Factual Review and Analysis of the Decision Premised Upon a Jury Verdict Reached After More Than Four Weeks of Trial, Resulting in the Creation of a Vast and Most Complex Record.

Hopefully, the foregoing factual recitations will delineate to some degree the complexities of the factual disputes between Heller and First Virginia which permeated the trial.

Heller would have this Court conduct a third factual review and analysis of a vast record generated by a jury trial lasting more than a month. For the very first time in this action which has now extended for more than four years, Heller suggests that the issue is whether one employee of a creditor is to report adverse information "after a second employee has given a favorable credit report."

Heller's failure to concede the existence of the material adverse information acquired prior to and as a result of its January, 1972 examination of Benson Co. amounts to a significant distortion of the record. This distortion then becomes the premise of Heller's argument with respect to "duty to update" and "after-acquired *scienter*" which is totally foreign to the case as tried. A concomitant of this information acquired by Heller with respect to the Benson Co. operations as of December 31, 1971, was a termination of any ongoing business relationship of a lending nature. It is simply not appropriate to represent to this Court that "the adverse information concerning the Bensons was gained by a Heller examiner in mid-June, 1972, almost a month after the May 24, 1972 conversation with Michelman." (Pet. 15) It is significant in view of the sharp factual disputes

that, although he attended almost the entire trial from start to finish as Heller's representative, Abrahams never testified at trial, although his testimony was presented in First Virginia's case by First Virginia's deposition of Heller through Abrahams.

The district court has heretofore reviewed this case in connection with the post-trial motions. The Fifth Circuit has conducted detailed review, particularly with respect to Heller's claim that there was no substantial evidence to support the jury verdict. The Fifth Circuit's unanimous opinion is expressly circumscribed to the unique facts involved and the circumstances surrounding the district court's charge.

Heller's petition is nothing more than a request that this Court conduct a third factual review and analysis of a record consisting of more than 5500 pages and approximately 570 exhibits.

II.

The Fifth Circuit Employed the Proper Standard in Reviewing the District Court's Charge, a Standard Approved by This Court, by Considering the Challenged Instruction as Part of the Entire Charge, in View of the Allegations in the Complaint, the Evidence Presented, and the Argument of Counsel to Determine Whether the Jury Was Misled and Whether the Jury Understood the Issues.

Prior to charging the jury, the district court conducted a lengthy precharge conference. (51, III) A great deal of thought and discussion preceded the district court's charge which composes approximately 85 pages of the record. The fact that one of the defendants, Jerome Wearb, received a favorable verdict demonstrates the jury's attention to the district court's charge.

The Fifth Circuit considered the challenged instruction as part of the entire charge, in view of the allegations in the complaint, the evidence presented, and argument of counsel to determine whether there existed prejudicial error. In applying

the standard articulated in *Sunkist Growers, Inc. v. Wickler & Smith Products Co.*, 370 U.S. 19 (1962), the Fifth Circuit determined that the general jury verdict was not predicated upon an erroneous theory of law, basing that determination upon an analysis of the complete charge, a consideration of the entire thrust of the presentation of evidence, the argument of counsel and allegations in the complaint. Having found no prejudice the Fifth Circuit properly sustained the judgment.

The standard of review requiring examination of an entire charge to determine the effect of isolated statements is a traditional test consistently followed by this Court. *See, e.g., Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973); *United States v. Park*, 421 U.S. 658, 674 (1975). The same standard of review requires consideration of an isolated charge not only in the context of the entire charge, but also with respect to the entire trial, including presentation of evidence and arguments to the jury. *See, e.g., United States v. Park, supra*, 421 U.S. at 674-75; *Cupp v. Naughten, supra*, 414 U.S. at 146-47 (rule requiring instruction to be judged in context recognizes that a verdict "is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipts of exhibits in evidence, and instructions of the jury by the judge. Thus, not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment. . . .")

This Court in *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946) explained the process for determining whether error is harmless or prejudicial:

> And the question is, not were they [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision . . . .
>
> This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. . . .
>
> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight

> effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress.

This rule applies to erroneous instructions. *Kotteakos*, 328 U.S. at 763.

The complaint against Heller (excluding the "aiding and abetting," and "controlling person" counts) expressly charges Heller with concealment or intentional conduct in Count IX, and in Count X with intentional fraud as charged against the other defendants in Count III and Count IV. (51, I:52-55, 7-8) There is no question but that First Virginia's counsel argued only intentional fraud and misrepresentation on Heller's part. (51, XIII:4343-4358, 4382, 4583-4585, 4592) Heller concedes that its counsel argued that liability could only be premised upon "intent to defraud". (Pet. 18)

The district court certainly never charged negligence in the context of a reasonable man standard, and never charged that Heller had any duty to exercise reasonable care in connection with any duty to investigate. The district court further expressly charged that any misstatement had to be with the intent to induce First Virginia to act, or done with appreciation that the information was reasonably sought in conjunction with a stock purchase or sale. All of First Virginia's evidence with respect to Heller deals with what information Heller had obtained, and no suggestion was made that Heller should have obtained different or more information. Most of Heller's evidence pertained to what information First Virginia had or should have had.

In *Sunkist*, the general verdict could have been premised upon a completely erroneous theory which was a blatant misconstruction of the federal antitrust statutes. Here, the Fifth Circuit did not say that the judgment necessarily must be ascribed to any specific ground, but found rather than the questioned aspect of the charge did not amount to prejudicial error in view of all the circumstances. In sum, First Virginia and Heller have no bona fide dispute with respect to the dictates of

Sunkist, or with the statements of law articulated and followed by the Fifth Circuit.

Certiorari would not provide any opportunity to elucidate any proper or different standard of review or concept of *scienter* under the federal securities laws.

III.

The Notion of "After-Acquired *Scienter*" or "Duty to Update" is an Academic Concept Concocted by Heller, Which Has No Application to the Judgment Heller Seeks to Avoid.

Heller's argument about "after-acquired scienter" presenting "grave concern to the nation's financial community" (Pet. 20) is a subterfuge unrelated to the holding in this case. The district court predicated First Virginia's entire case against Heller upon the representations made by Abrahams to Michelman on May 24, 1972:

> You would have to tell whether in fact obviously the statements were made. *And you would have to decide really whether they were untrue.* (51, XIII:4630-4631) [Emphasis added]

(See also 51, XIII:4640.) First Virginia's "controlling person" and "aiding and abetting" theories were rejected. The district court characterized "the ultimate gist of" First Virginia's case against Heller "to be essentially the charge of misrepresentation by either direct misstatement, or by half-truth." (51, XIII:4682) The conversation on May 24, 1972, was the only vehicle for transmission of the misrepresentations which the jury could and did find.

Although the Fifth Circuit stated that the jury could find a duty on Heller's part to disclose information acquired after May 24, 1972, this was only an observation which does not reflect how the case was submitted to the jury. In this regard, however, the unique and most meaningful specific facts applicable to Heller should be scrutinized. It is certainly inappropriate to characterize Heller's actions as simply the communication of credit information.

Following Abrahams' favorable report to Michelman about the Benson Co. operations on May 24, 1972, Heller completed its report on the investigation of Benson Co. which was commenced on May 22, 1972, and was being conducted at the very time of Abrahams' conversation with Michelman. A Heller report dated as of April 30, 1972 (Pl. Ex. WH-14), was completed in final form in June, 1972. (51, VIII:2288-2289) The written report was received in Chicago on June 16, 1972. However, Heller's examiner was in contact with the home office by telephone during the course of the examination reporting progress and findings on a frequent basis. (51, XI:3520-3521, 3525-3526) The report expressly reveals that Benson Co. was quite busy "doctoring" records in an effort to inflate assets and income to present a more favorable picture to merger prospects (Pl. Ex. WH-14), and that such practices were instituted and/or condoned by Benson Co.'s management. (51, VIII:2296-2298, XI:3512)

None of the information which was accumulated during the May, 1972 examination was communicated to Michelman in order to correct the prior misrepresentations Abrahams had made. Abrahams spoke by telephone with First Virginia during July, 1972 (51, VIII:2106, 2311-2312) (Pl. Ex. WH-27) when he was advised that First Virginia was going to take out Heller's loan to Benson Co. This call to Abrahams, which expressly identified the Benson Co. purchaser, transpired *before* First Virginia and its affiliate rescued Heller from its precarious loan to Benson Co. Abrahams elected not to rectify at that time his prior half-truths or misstatements. By August 25, 1972, First Virginia had caused a sufficient advance of funds to extinguish Benson Co.'s indebtedness to Heller of approximately $3,720,000 (51, VIII:2312), which included $73,000 in interest which Heller allowed to accumulate during the months of June, July and August, 1972. (Pl. Ex. WH-18) Heller thus effectuated its deliberate capitalization upon Abrahams' misrepresentations, and was extricated from involvement with a failing

business enterprise and a loan secured by the very accounts receivable Heller knew to be tainted. (51, VIII:2241-2245)

Heller's argument referable to some fabricated "duty to update" simply obscures the factual framework of the case. Heller's obligation to act with respect to this most material information (which confirmed Heller's earlier conclusions leading to a termination of loans to Benson Co.) must be viewed with respect to Heller's most substantial economic benefit from a continuity of the deception of First Virginia. This case cannot conceivably have any effect upon any lending institution that has not intentionally gained an economic benefit by deception accomplished through a deliberate misrepresentation while possessing very material inside information. The June, 1972 report was most relevant and pertinent to the issue of intentional fraud with respect to all the defendants. Following receipt of this written report in Chicago, Heller never attempted to collect its loan, and allowed interest to accrue up to the date First Virginia advanced total payment.

Although the Fifth Circuit never specifically addressed the issue, the indelible fact is that Heller made no meaningful objection to the introduction into evidence of this report. The record is not ambiguous with respect to this matter. Heller's statement to this Court that the report was admitted "over the strenuous objection of Heller" (Pet. 9) is clearly contrary to the record. Heller initially objected, the district court having understood Heller's objection gave an explanatory charge, and Heller withdrew its objection. (51, VIII:2288-2289)[3] Heller's record citation in support of the claim of "strenuous objection" constitutes First Virginia's citation submitted as proof that any objection was withdrawn or waived (51, VIII:2288-2289):

(First Virginia): At this time we offer WH-14, your Honor.

(Heller): Your Honor, I have one objection to make.

[3]The contents of this exhibit were the subject of detailed interrogation conducted without objection; see 51, VIII:2290-2297; XI:3512-3523.

The Court: All right.

(Heller): That the report offered out of context would be misleading and that it has a date of April 30th on it which was the aging date.

It has another date of May the 22nd which was the date the audit commenced and it was completed June 16th.

. . .

The Court: Well, could there not be some testimony relevant to that?

(Heller): Yes, sir. I can produce through a deposition a week later after I get in my case.

The Court: Well, I think . . .

(Heller): I have no objection with that explanation.

The Court: Bearing in mind that the Defendant, Heller, expects to present some evidence to the effect that the date shown was not necessarily the date on which the examination was completed.

It's received.

(Heller): All right.

This rather insubstantial matter does illustrate two pertinent points: (1) that there is a sharp factual dispute between First Virginia and Heller, and (2) that Heller has not been accurate with respect to the facts.

IV.

The Fifth Circuit's Decision with Respect to the Case, Which "Does Not Present Many Novel Applications of 10b-5 or Fraud Liability," is Correct.

Although at the time the jury was charged, the district court did not have the benefit of this Court's opinion in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), decided some eight months later, the standard of proof required by *Hochfelder* was met under the facts and evidence in this case. In *Hochfelder*, the

only claim was expressly predicated upon mere negligence; in this case, the thrust of First Virginia's claim and evidence against Heller was intentional misrepresentation. This was the district court's clear concept of the case. The evidence of Heller's actual knowledge of the deplorable financial condition of Benson Co. on and prior to May 24, 1972, is not subject to meaningful challenge. Until the filing of Heller's petition, it had never been suggested that this was a "duty to update" case.

This case is not pertinent to any lending institutions other than Heller. To the extent that the actual charge given by the district court may have been deficient, any such deficiencies have been addressed by the Fifth Circuit's opinion in a manner to preclude any future confusion. The result of the case is fully consistent with the express language of Rule 10b-5. Certainly, the opinion of the Fifth Circuit does not in any way tend to expand the application of Rule 10b-5, or common law fraud theories. Since the facts are unique due to the extreme degree of Heller's culpability, the holding in this case is not detrimental to lenders, but fosters the remedial purpose of the federal securities laws.

The holding in this case, as well as the thrust of the Fifth Circuit's opinion, affects only the following category of non-sellers: a party who (i) stands to reap an economic benefit as a result of a stock purchase or sale; (ii) has specific, material information bearing directly on the value of the stock; (iii) has actual knowledge of the existence of negotiations referable to such securities; (iv) elects to make affirmative representations of material fact known to be false and misleading; (v) makes those representations to a "finder" or "broker"; (vi) and knows that its representations are likely to be relied upon by a potential purchaser. As the Fifth Circuit clearly admonished, "our conclusions and holdings must be regarded in the peculiar context in which they arise." (A.13)

Heller received a fair trial.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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